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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

R CONSULTING & SALES, INC.,

Plaintiff and Respondent,

v.

INFO TECH CORPORATION et al.,

Defendants and Appellants.

D072492

(Super. Ct. No. 37-2015-00002561-CU-
BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed; motion to dismiss denied.

Burkhalter Kessler Clement & George, Daniel J. Kessler and Ros M. Lockwood for Defendants and Appellants.

Metsch Law Group, Michael J. Mason and Paul S. Metsch for Plaintiff and Respondent.

The trial court issued a terminating sanction dismissing the cross-complaint and striking the answer of Info Tech Corporation (Info Tech) and Andy Kim (Kim, together with Info Tech, defendants) based on its conclusion that defendants had spoliated evidence by

sabotaging their electronic e-mail server and storage array (together, the servers) in contravention of plaintiff R Consulting & Sales, Inc.'s (R Consulting) right to this discovery. After a default prove-up hearing, the court entered a default judgment against defendants for over \$2.4 million.

Defendants appeal from the judgment, arguing that the trial court committed reversible error by relying on the contradicted hearsay of R Consulting's forensic expert in determining that they had willfully destroyed discoverable evidence. Defendants also contend that substantial evidence did not support the trial court's ruling and therefore the court abused its discretion by granting terminating sanctions. In addition to opposing defendants' contentions on appeal, R Consulting moves to dismiss the appeal under the disentitlement doctrine based on defendants' failure to comply with the judgment enforcement process. We deny the motion to dismiss and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND¹

In January 2015 R Consulting sued defendants for breach of an agreement to lease a private jet by failing to make the required lease payments. R Consulting also alleged that defendants contracted with vendors to perform services on the aircraft and provide supplies, that defendants have not paid these vendors, and that it might be forced to pay these vendors to prevent them from placing liens on the aircraft. In April 2015 defendants filed a cross-complaint alleging, among other things, that R Consulting defrauded them by making false

¹ During this litigation six different attorneys represented defendants. Defendants do not argue that these attorney substitutions are relevant to this appeal, other than to assert that the trial court became frustrated with the substitutions. Accordingly, our recitation of the facts does not indicate when these substitutions occurred.

representations about the aircraft. In July 2015, during a corporate restructure, defendants allegedly moved the servers to a third party data center, US Colo, and placed other nonessential servers in public storage. In March 2016 R Consulting filed a first amended complaint, followed by a second amended complaint in early April 2016. The second amended complaint included an allegation that defendants misrepresented that they would not use the jet for commercial flights.

In April 2016 R Consulting moved to compel compliance with inspection demands based on, among other things, alleged missing e-mails. In opposition to the motion, Kim filed a declaration representing that, based on a change of its corporate infrastructure, Info Tech changed servers, that some of the documents R Consulting sought were deleted but might be on servers in storage, accessing the data would take months, and defendants could not produce documents within the time frame requested. About a week later, Kim filed another declaration, this time representing that in July 2015 Info Tech had shut down 10 servers in a corporate restructure, that the servers were in storage, and that restoring the files would take 200,000 hours, the equivalent of 25,000 eight-hour work days. After a hearing on the motion, the court ordered each side to obtain a cost estimate for putting the servers back online.

In June 2016 R Consulting moved for issue and evidentiary sanctions against defendants, arguing that Kim's time estimate to restore the files was absurd and that its digital forensics expert, James Vaughn, needed to physically inspect the servers to determine the cost and time needed to extract responsive documents, but that defendants refused to provide their location. Vaughn stated in his declaration that Kim's time estimate displayed

"Kim's lack of knowledge in the area of electronic discovery and how to restore data."

Vaughn opined that if Kim answered some questions, the data could be recovered in a matter of weeks.

The trial court issued a tentative ruling stating it agreed with R Consulting that third party documents could lead to the discovery of admissible evidence because R Consulting has shown that third party debts are an ongoing problem subjecting the aircraft to potential liens or seizure. The court questioned Kim's credibility as Kim now stated in a declaration that he could retrieve documents by restoring individual mailboxes. The court noted that Kim did not provide a cost estimate to restore the servers and that defendants have stymied R Consulting's attempts to meet and confer regarding a visual inspection of the servers. The court ordered Kim to produce the documents at his own expense, indicated it would issue monetary sanctions and that its ruling was without prejudice to possible additional sanctions. The court confirmed its ruling after hearing from the parties and ordered monetary sanctions against defendants in the amount of \$16,300.

In August 2016 the court held a status conference regarding discovery and granted R Consulting's request to examine defendants' servers. In September 2016 R Consulting filed an ex parte application for an order to shorten time regarding contempt against defendants for their failure to pay monetary sanctions and for a further sanctions motion. The court ordered defendants' counsel to establish a payment plan for the monetary sanctions. In November 2016 R Consulting filed ex parte applications (1) to compel compliance with the court's order to inspect defendants' servers; and (2) for an order compelling immediate payment of all outstanding monetary sanctions, or alternatively for an

order shortening time regarding contempt for failing to pay the sanctions. The court ordered that the inspection occur on either December 6 or 7, 2016, and indicated that it would impose an additional \$10,000 in sanctions against defendants if the inspection did not occur on either date.

R Consulting hired Jonathan Karchmer, an electronic discovery and digital forensics expert, to retrieve e-mail from the Info Tech servers. On November 1, 2016, Karchmer visited US Colo to inspect the Info Tech servers with counsel for both parties. Karchmer found that the e-mail server was inoperable because it would not boot to its Windows operating system and no e-mail server software could function. Karchmer's forensic software booted, but could not recognize any logical drives.

Karchmer stated that "[at] least one logical drive should have been recognizable. The fact that no logical drives were found is an indication that data on the server's drives had changed (or was overwritten), or the drive configuration may have been changed on the controller—which is what allows the computer to communicate with the hard drives." Karchmer ultimately concluded that no e-mail could be extracted and that the hard drives from the server and its storage array would need to undergo a digital forensic examination to determine if any data could be extracted. Karchmer and a colleague forensically imaged the hard drives from the server and the storage array for later examination.

In January 2017 the court imposed additional sanctions of \$1,500 against defendants and ordered defendants to make \$2,000 installment payments on the prior sanction order on certain dates. Based on R Consulting's ex parte application, the court set a motion for terminating sanctions. Thereafter, defendants filed an ex parte application for an order

compelling R Consulting to produce documents necessary to oppose the motion for terminating sanctions. The court ordered the parties to exchange expert information, stated that the experts were to meet and confer to identify what was needed, and that counsel would meet and confer thereafter.

In preparation for a status conference, R Consulting's expert, Vaughn, filed a declaration noting that defendants never asked to see the forensic images created for R Consulting and he did not know whether defendants' expert had created his own images. Vaughn texted defendant's expert, Ashraf Massoud. Massoud acknowledged receipt of the text, but the experts never met and conferred. Vaughn later e-mailed R Consulting's counsel to inform counsel that Massoud stated that all communications with him were to be over e-mail and copied to counsel. At a hearing in February 2017 R Consulting's counsel informed the court that defendants had not made their expert available. Defendants' counsel indicated that he had "the information and we're ready to oppose [the motion for terminating sanctions] on Wednesday."

R Consulting's motion sought issue, evidentiary or terminating sanctions against defendants. R Consulting asserted that its experts concluded that defendants had intentionally sabotaged their servers to prevent R Consulting from obtaining e-mails and other documents necessary to prosecute its complaint and to defend against defendants' cross-complaint. Karchmer presented a lengthy declaration in support of R Consulting's motion detailing his findings after examining the servers and the hard drive images. Defendants filed declarations from Kim and Massoud in opposition to the motion. Karchmer filed a reply declaration refuting Kim and Massoud's conclusions. The trial

court tentatively granted terminating sanctions and later confirmed its ruling after hearing oral argument.

Thereafter, defendants moved for reconsideration based on new evidence. They also argued that R Consulting failed to present any evidence showing intentional sabotage. The court denied the reconsideration motion. Defendants then filed an ex parte application for an order allowing limited third party discovery and to depose Karchmer prior to the default prove-up hearing. The court denied the requests. Defendants timely appealed from the default judgment. R Consulting later filed a motion to dismiss the appeal under the disentitlement doctrine.

DISCUSSION

I. *MOTION TO DISMISS*

We have the inherent power under the disentitlement doctrine to dismiss an appeal by a party that refuses to comply with a trial court order. (*Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, 265.) The disentitlement doctrine "is a discretionary tool that may be used to dismiss an appeal when the balance of the equitable concerns makes dismissal an appropriate sanction. [Citation.] The rationale underlying the doctrine is that a party to an action cannot seek the aid and assistance of an appellate court while standing in an attitude of contempt to the legal orders and processes of the courts of this state. [Citation.] No formal judgment of contempt is required under the doctrine of disentitlement. [Citation.] An appellate court may dismiss an appeal where the appellant has willfully disobeyed the lower court's orders or engaged in obstructive tactics." (*Gwartz v. Weilert* (2014) 231 Cal.App.4th 750, 757-758, fn.

omitted.) Appellate courts have used the inherent power to dismiss an appeal in several cases where a party failed or refused to appear for a judgment debtor examination. (See, e.g., *TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 380 (*TMS*); *Say & Say v. Castellano* (1994) 22 Cal.App.4th 88, 94 (*Say & Say*); *Stone v. Bach* (1978) 80 Cal.App.3d 442, 443-444 (*Stone*); *Tobin v. Casaus* (1954) 128 Cal.App.2d 588, 589, 593.)

R Consulting asserts that defendants' appeal should be dismissed because Kim has materially failed to comply with his obligations during the judgment enforcement process by: (1) failing to appear at four court-ordered judgment debtor exams, (2) violating the court's salary turnover order, (3) committing perjury at his judgment debtor examinations, and (4) failing to file individual tax returns since 2008. As a result of defendants' actions, R Consulting claims that the trial court granted its motion for an order to show cause re contempt.

Defendants oppose the motion, arguing that it is based on an exaggerated and misstated account of the postjudgment proceedings. Defendants complain that R Consulting has categorized commonplace ambiguities in testimony during debtor's exams as lies. Defendants assert that rather than communicating with their counsel about unanticipated scheduling difficulties, R Consulting immediately files motions to compel and rushes into court seeking the trial court's intervention for easily resolvable concerns. Defendants support their opposition with declarations from Kim and defense counsel. As we shall explain, we decline to exercise our discretionary power to dismiss the appeal.

A. Failing to Appear at Judgment Debtor Examinations

1. November 7, 2017 examination

R Consulting states that Kim failed to appear at a judgment debtor's examination scheduled for November 7, 2017, and gave inconsistent explanations for this failure. Kim first claimed that he had car trouble, but then stated he had problems with an aircraft. Review of Kim's declaration shows that he initially had a car problem. He decided to take a company airplane, but the pilot discovered a problem during the preflight check that make the aircraft "unflyable." Kim then lacked to time to get the car repaired and attend the examination. Defense counsel appeared at the examination to explain the problem to the judge.

During his November 16, 2017 debtor's exam, Kim testified that the car, and not an aircraft, was the cause of his failure to appear. Thus, R Consulting claims that Kim committed perjury in his declaration. We disagree. Kim's car problem caused him to look for alternative aircraft transportation to the examination, which was also in disrepair. Kim's statement that his failure to appear was the result of a car problem and not an aircraft problem merely focused on the first mechanical problem and not the second.

2. January 5, 2018 examination

R Consulting states that Kim failed to appear at a continued judgment debtor's examination scheduled for January 5, 2018; however, gambling records show that Kim gambled on January 5, 2018, which is also a violation of a salary turnover order that

requires Kim to pay 25 percent of his disposable earnings to R Consulting.² Defense counsel explains that he believed that the examination started at 10:30 a.m., however, he failed to review the minute order which set the start time at 10:00 a.m. Kim and defense counsel appeared at 10:15 a.m., but the court indicated that R Consulting's counsel had already left. This scheduling error by defense counsel should not be imputed to his clients' detriment and, even if it were, it falls considerably short of the type of conduct warranting dismissal of the appeal.

3. July 13, 2018 examination

R Consulting claims that defense counsel represented that Kim chose not to appear at this court-ordered examination because he allegedly had not received any documents from two banks. Defense counsel explains that prior to the scheduled examination he had sent two letters to R Consulting's counsel regarding the bank documents and stated in an e-mail that Kim would not appear at the examination because he had no bank documents and it served no purpose for Kim to travel from Korea to California. The day before the examination, R Consulting's counsel sent an e-mail stating that it expected Kim to appear. Kim did not appear at the examination and R Consulting's counsel represented that Kim did not appear because he did not have the requested documents. The letters and e-mails show only a lack of cooperation between counsel.

² Although defendants did not object to the exhibits filed by R Consulting in support of its motion, we note that R Consulting made no attempt to authenticate any of the documents, including the purported business records which supposedly show Kim's gambling. (Evid. Code, § 1400.) Accordingly, these purported business records do not support a conclusion that Kim was gambling away money that should have been turned over to R Consulting.

4. October 12, 2018 examination

R Consulting states that Kim failed to appear at the October 12, 2018 court-ordered examination. While this is correct, R Consulting fails to mention that defense counsel attempted to continue the examination because Kim was out of the country. When R Consulting refused, defense counsel claims that he attempted to obtain an ex parte reservation to continue the date, but none were available until after October 12, 2018. As suggested by the calendar clerk, defense counsel presented his ex parte application on October 12. This lack of cooperation between counsel and the court's calendaring issue does not warrant dismissal of an appeal.

B. Violation of Salary Turnover Order

R Consulting notes that the court's January 17, 2018 salary turnover order required Kim to, among other things, provide it with monthly paystubs starting in February 2018 showing his earnings from his three employers (Outsourced Solutions, Inc. (Outsourced), Emajee, Inc. (Emajee) and IT Source Korea to effectuate a prior order requiring Kim to pay R Consulting 25 percent of his disposable earnings. R Consulting complains that Kim did not timely provide the paystubs, that the records provided show paltry earnings, yet, on March 10, 2018, Kim traveled to Las Vegas and gambled with a \$25,000 check from Outsourced Solutions.

Defendants admit that Kim untimely produced the pay records, state that the issue was presented to the trial court, which refused to award sanctions and instead admonished Kim. Kim previously explained to R Consulting that he used the \$25,000 to entertain clients and asserts that R Consulting is knowingly misrepresenting the facts regarding this

check. Defendants' exhibits show that Kim previously explained the \$25,000 check in two declarations. It appears that R Consulting simply refuses to accept Kim's explanation.

C. Failure to File Tax Returns

R Consulting notes that Kim admitted that he has failed to file individual tax returns since 2008, claiming this failure is "symptomatic of his practice of hiding money from R Consulting to thwart its efforts to enforce the Judgment." We disregard this allegation because it is not relevant to the issue of whether defendants' appeal should be dismissed.

D. Alleged Perjury

R Consulting claims that Kim committed perjury during his judgment debtor examinations by: (1) lying about rent payments at his former Los Angeles residence, (2) claiming that he earns no income from one of his employers, and (3) lying and repeatedly changing his testimony about the location of documents. Defendants argue that R Consulting's refusal to believe Kim's testimony does not constitute perjury.

Perjury is the willful failure to truthfully testify while under oath. (Pen. Code, § 118, subd. (a).) "The elements of perjury are: 'a "willful statement, under oath, of any material matter which the witness knows to be false." ' " (*People v. Garcia* (2006) 39 Cal.4th 1070, 1091.) The record does not support R Consulting's perjury allegations.

R Consulting claims that Kim's testimony about not knowing who owns a particular home, that his mother probably pays the rent, and not knowing the rental amount are false because Kim once paid the rent with a check from Outsourced. Kim

addressed the rental payment issue in documents and a declaration filed in the trial court explaining that his mother directed him to sign checks from Outsourced, that some of these checks may have been for rent, and that his testimony about not knowing certain facts was truthful. This evidence does not show that Kim committed perjury.

R Consulting claims that Kim falsely testified that he earns no income from one of his employers, 360 Jets, based on Kim's testimony that he is authorized to use aircraft belonging to 360 Jets. R Consulting states that this testimony "is laughable and more obvious perjury from Kim." Laughable or not, R Consulting presented no evidence showing that Kim earns any income from 360 Jets. Thus, R Consulting has not shown that Kim committed perjury.

Finally, R Consulting contends that Kim's changing testimony at his March 8, 2018 judgment debtor's examination shows that Kim committed perjury about the location of documents. Kim testified that he first went to an Emajee storage unit to look for records, but was locked out of the unit for not paying the bill. Kim later clarified that he learned that the storage unit actually belonged to Info Tech, but that he was still locked out. In a later declaration, Kim stated that after Info Tech had been evicted from its office for nonpayment of rent, he was able to inspect its storage locker and office. Kim found no Info Tech documents in either location. Kim stated that all the Info Tech documents had been scanned to its central server housed at US Colo. While this changing testimony is undoubtedly frustrating to R Consulting, without more it does not show that Kim committed perjury.

Finally, R Consulting points to a portion of another Kim declaration stating that the last time he or any Info Tech employee had physical access to the servers at US Colo was on or around April 2016. R Consulting claims this is perjurious because the owner of US Colo, Rick Fisher, testified in a July 28, 2017 declaration that members of Info Tech, including Kim, can access Info Tech's Servers at any time and that US Colo has no security interest in the servers. This discrepancy supports R Consulting's perjury allegation and also leads us to the substance of defendants' appeal. (*Post*, pt. IV.)

E. *Summary*

As frustrating as Kim's behavior and testimony have been during the judgment debtor process, dismissal of defendants' appeal is not the appropriate remedy. This is not a case like *TMS*, *supra*, 71 Cal.App.4th 377 where, despite a trial court order, defendants willfully refused to respond to postjudgment interrogatories and the judgment debtor fled the jurisdiction. (*Id.* at p. 380; see also *Say & Say*, *supra*, 22 Cal.App.4th at p. 94 [three contempt findings as to corporate alter ego warranted dismissal of appeal as to corporation]; *Stone*, *supra*, 80 Cal.App.3d at pp. 443-444 [two contempt findings based on refusing to be sworn for examination as a judgment debtor and failing to comply with court order].) We exercise our discretion to deny the motion and turn to the merits of defendants' appeal.

II. GENERAL LEGAL PRINCIPLES REGARDING TERMINATING SANCTIONS

A trial court may impose a terminating sanction when there has been a misuse of the discovery process. (Code Civ. Proc.,³ § 2023.030, subd. (d).) Misuses of the discovery process include "[f]ailing to respond or to submit to an authorized method of discovery." (§ 2023.010, subd. (d).) The court has discretion to choose from a wide range of penalties to fashion an appropriate remedy, including monetary, evidentiary, issue and/or terminating sanctions. (§ 2023.030.) Terminating sanctions may take the form of orders striking a pleading, dismissing the action and rendering a default judgment. (§ 2023.030, subd. (d)(1), (3) & (4).)

"The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should ' 'attempt[] to tailor the sanction to the harm caused by the withheld discovery.' ' " (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992.) Destroying evidence in response to a discovery request after litigation has commenced is a misuse of discovery within the meaning of section 2023.010, as would be such destruction in anticipation of a discovery request. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12 (*Cedars-Sinai*).)

In discussing the harmful effect of spoliation of evidence to a party's case, the California Supreme Court stated "the intentional destruction of evidence should be condemned. Destroying evidence can destroy fairness and justice, for it increases the risk

³ Undesignated statutory references are to the Code of Civil Procedure.

of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both." (*Cedars-Sinai, supra*, 18 Cal.4th at p. 8.) "[B]ecause 'the relevance of . . . [destroyed] documents cannot be clearly ascertained . . . ,' a party 'can hardly assert any presumption of irrelevance as to the destroyed documents.' " (*Leon v. IDX Sys. Corp.* (9th Cir. 2006) 464 F.3d 951, 959.)

DECLARATION

Defendants assert that the court committed reversible error by relying upon the contradicted hearsay of Karchmer, R Consulting's digital forensic expert, in determining that they had willfully destroyed discoverable evidence. Defendants concede that section 2009 allows affidavits to be used in deciding motions; however, they argue that section 2009 does not apply because the motion for terminating sanctions resulted in a judgment, not merely a ruling on a motion. Relying on *Elkins v. Superior Court* (2007) 41 Cal.4th 1337 (*Elkins*), defendants argue that because the trial court's ruling rested upon its determination that R Consulting's declaration was more credible than defendants' declarations, the judgment must be reversed because the court denied them the opportunity to cross-examine Karchmer.

Defendants contend this matter should be remanded to the trial court with an order requiring the court to vacate the judgment and the imposition of terminating sanctions. In the alternative, they claim they should be allowed the opportunity to conduct limited discovery regarding the servers, including the right to cross-examine Karchmer. We reject defendants' argument that Karchmer's declaration constituted inadmissible hearsay.

In *Elkins*, the Supreme Court struck a local court rule that called for the admission of declarations in lieu of live testimony *at trial*. The Supreme Court found that the local court rule was inconsistent with the well-established rule that "declarations constitute hearsay and are inadmissible at trial, subject to specific statutory exceptions, unless the parties stipulate to the admission of the declarations or fail to enter a hearsay objection. [Citations.] [¶] The law provides specific exceptions to the general rule excluding hearsay evidence (see, e.g., Evid. Code, § 1220 et seq.), including those governing the admission of affidavits or declarations." (*Elkins, supra*, 41 Cal.4th at pp. 1354-1355.) One of those statutory exceptions to the hearsay rule is section 2009, which authorizes affidavits or declarations in certain matters, including motions.⁴ (*Elkins*, at p. 1355; *Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1309 ["[S]ection 2009 generally permits the use of affidavits in hearings on motions in civil litigation."].) Section 2015.5 provides that properly composed declarations under penalty of perjury are the equivalent of affidavits.⁵

⁴ Section 2009 provides: "An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, *or upon a motion*, and in any other case expressly permitted by statute." (Italics added.)

⁵ Section 2015.5 permits a person to prove a matter "by the unsworn . . . declaration . . . in writing of such person which recites that it is certified or declared by him or her to be true under penalty of perjury, is subscribed by him or her, and . . . if executed within this state, states the date and place of execution, or . . . if executed at any place, within or without this state, states the date of execution and that it is so certified or declared under the laws of the State of California."

The correctness of the trial court's decision to rely on Karchmer's declaration turns on whether declarations are admissible evidence to establish facts used in deciding a motion for terminating sanctions. As a preliminary matter, we note that defendants objected to two portions of Karchmer's declaration as constituting hearsay. They never argued, however, that Karchmer's entire declaration constituted inadmissible hearsay. Generally, evidentiary objections not made in the trial court cannot be asserted on appeal. (Evid. Code, § 353, subd. (a); *People v. Eubanks* (2011) 53 Cal.4th 110, 142 [failing to raise hearsay objection at trial forfeits the objection on appeal].) We decline to allow defendants to raise this objection now when they failed to raise it in the first instance in the trial court. Moreover, defendants did not request to present live testimony before the court ruled on the motion, nor did they object to the court deciding the motion based solely on declarations. Therefore, defendants forfeited their objections to the form of proof in deciding the motion. (*Bardessono v. Michels* (1970) 3 Cal.3d 780, 793 [defendant waived objections to the form of proof of juror misconduct by failing to object in the trial court].)

In any event, we reject defendants' assertion that the trial court erred by deciding the motion for terminating sanctions based on declarations. "Section 2009 is construed as empowering the trial court to determine motions upon declarations alone and to allow the court discretion to refuse oral testimony. [Citations.] [¶] A motion is defined in . . . section 1003. That section states: 'Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.' " (*Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 483 (*Reifler*).)

In *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394 the court said that where fraud is alleged, oral testimony may be required to weigh the credibility of witnesses. (*Id.* at p. 414.) However, the *Rosenthal* court also said that hearings on motions "ordinarily mean the facts are to be proven by affidavit or declaration and documentary evidence, with oral testimony taken only in the court's discretion. [Citations.] [¶] . . . There is simply no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony." (*Id.* at pp. 413-414.)

Section 2023.030, subdivision (a), provides that the court, "after notice to the affected party, person, or attorney, and after opportunity for hearing," may impose monetary and nonmonetary sanctions for discovery abuse. The statute does not require an evidentiary hearing—only notice and an opportunity to be heard, which defendants received. (*Seykora v. Superior Court* (1991) 232 Cal.App.3d 1075, 1082 ["[t]he 'opportunity to be heard,' in the context of a hearing on the issue of [monetary] sanctions, [under § 2023.030] does not mean the opportunity to present oral testimony"].)⁶ "[T]he scope of a hearing on an application for

⁶ Defendants' reliance on *People v. Johnson* (2006) 38 Cal.4th 717 (*Johnson*) and *Reifler, supra*, 39 Cal.App.3d 479 as discussed in *Elkins, supra*, 41 Cal.4th at pages 1355-1357 for the proposition that live testimony is required here because the sanction order resulted in a judgment against them is misplaced because the statutes at issue in *Johnson* and *Reifler* contemplated a hearing with live testimony. In *Johnson*, the court addressed whether live testimony rather than affidavits was required on a motion to suppress hearing under Penal Code section 1538.5. (*Johnson*, at p. 720.) After examining the relevant statutes, the *Johnson* court concluded that the "statutes clearly contemplate that a suppression motion will be litigated at a hearing at which live witnesses testify." (*Id.* at p. 725.)

sanctions is within the trial court's discretion, as with motions generally." (*Lavine v. Hospital of the Good Samaritan* (1985) 169 Cal.App.3d 1019, 1028 (*Lavine*) [addressing section 128.5 sanctions motion].) Defendants have not cited, and we have not located, a California case holding that a trial court cannot rely on contested declarations and must hold an evidentiary hearing before imposing monetary or nonmonetary sanctions under section 2023.030. Rather, "[n]othing in section [2023.030] precludes a party against whom sanctions are sought thereunder from subpoenaing and producing evidence and witnesses or otherwise defending against the request; the scope of a hearing on an application for sanctions is within the trial court's discretion, as with motions generally." (*Lavine*, at p. 1028.)

Here, defendants never requested an opportunity to present live testimony,⁷ and they waited over a month after the trial court issued its tentative ruling on the motion for

In *Reifler*, the court found that section 1217, governing an order to show cause regarding contempt, "specifically provides that in matters of indirect contempt the court may examine witnesses for and against the alleged contemner." (*Reifler, supra*, 39 Cal.App.3d at p. 484.) Nonetheless, the *Reifler* court "conclude[d] that except for the proceedings on the order to show cause re Husband's alleged contempt, the trial court was empowered to hear the [family law] matters before it upon declarations and to exclude oral testimony." (*Id.* at p. 485.)

⁷ California Rules of Court, rule 3.1306(a) is consistent with section 2009, stating "[e]vidence received at a law and motion hearing must be by declaration" Rule 3.1306(b) provides: "Request to present oral testimony [¶] A party seeking permission to introduce oral evidence, except for oral evidence in rebuttal to oral evidence presented by the other party, must file, no later than three court days before the hearing, a written statement stating the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing. When the statement is filed less than five court

terminating sanctions to request an opportunity to cross-examine Karchmer. (*People v. Skiles* (2011) 51 Cal.4th 1178, 1189 [asserted deprivation of right to cross-examination must be raised in trial court]; *Mendoza v. Ramos* (2010) 182 Cal.App.4th 680, 687 [the right to live testimony or examine a witness may be forfeited].) If defendants believed they needed to present live testimony or cross-examine Karchmer to oppose the motion, they needed to inform the trial court of this desire before the court ruled on the motion. Instead, before the trial court decided the motion, defendants represented that their expert had the information he needed and "we're ready to oppose [the motion] on Wednesday."

Accordingly, we reject defendants' argument that the trial court erred in deciding the motion for terminating sanctions based solely on declarations filed in connection with the motion.

IV. SUBSTANTIAL EVIDENCE SUPPORTED THE ORDER

A. Evidence Presented by the Parties

Karchmer presented a lengthy declaration in support of R Consulting's motion. Karchmer explained that the e-mail server, which contained two physical hard drives, was connected to a storage array that contained 14 hard drives. One of the 14 hard drives was not fully connected to the storage array. Karchmer was unable to extract any e-mails from the server or its storage array; he had all hard drives forensically imaged for later examination to determine what data they contained.

days before the hearing, the filing party must serve a copy on the other parties in a manner to assure delivery to the other parties no later than two days before the hearing."

Karchmer determined that the two hard drives in the e-mail server did not contain an operating system. This means that these hard drives were either not the original hard drives that were used with the e-mail server or they had been overwritten with other data.

However, these hard drives contained e-mail fragments, suggesting that the e-mail server had once functioned. Karchmer determined that these hard drives actually came from the storage array and that someone had moved the hard drives out of the storage array and put them in the e-mail server. The unconnected hard drive in the storage array supported this conclusion.

Karchmer stated that forensic "examination of the hard drives showed a hodgepodge consisting of: a) operating system drives taken from other servers or computers, b) a Linux system hard drive, as well as c) other hard drives that are unknown. The only way this could occur is if other hard drives had been physically removed from other systems and then put into this array arbitrarily. The effect of moving hard drives around in this way is to destroy the logical volume or volumes that was/were once in the storage array. In other words, it prevents a normal user from properly accessing the data, and even worse, prevents a forensic examiner from piecing the data back together because data is missing." Karchmer concluded that "[t]he effect of mixing up hard drives across servers was to make recovery of these PST files, along with the original Exchange mailboxes impossible." Based on data found on one e-mail server hard drive, Karchmer determined that the "'shuffling' of hard drives between systems occurred on or after July 14, 2016 and before November 1, 2016."

Defendants opposed the motion, arguing that R Consulting's arguments were flawed because: "(1) Plaintiff's expert fails to take account of reasonable possibilities and other causes for his failure to obtain data; (2) Plaintiff fails to establish its allegations under any

applicable legal standard for monetary, issue/evidentiary, and especially terminating sanctions; (3) An unsuccessful discovery production resulting in a frustrated discovering party does not warrant an accusation of 'spoilage of evidence' nor justify Plaintiff's tactic to distract the Court; (4) Even if the servers are now inoperable, any information produced from the servers is not relevant to the case at hand and still discoverable through depositions and third party subpoenas; and (5) Plaintiff's attempt to dismiss the case without trying the case on the merits will result in a severe violation of due process and the potential for abuse of discretion by this Court."

Kim stated that US Colo blocked physical access to the servers in April 2016 and disconnected remote access in June or July 2016. Thus, Kim claimed that during the time frame identified by Karchmer (July 2016 to November 2016) it was impossible for anyone from Info Tech to physically tamper with the servers and hard drives. Kim claimed that when Karchmer inspected the servers that Karchmer "caused the RAID configuration to be overwritten." Kim claimed that Karchmer could not extract any data from the servers based on his own conduct.

Massoud reviewed Karchmer's declaration and interviewed Kim "to inquire as to (a) the history of the servers at issue, (b) their transfer and set up at US Colo, (c) the timeline of their operation, access, and shutdown, and (d) his observations during Mr. Karchmer's and/or his group's inspections and examinations of the servers." Massoud stated that "a wide range of possible errors or occurrences" could explain why Karchmer could not retrieve any data "such as file system corruption, RAID controller failures, onboard power management failures (i.e. system batteries failing and therefore configuration settings are lost) or other

data corruption issues." Massoud concluded that it could not "be said to a reasonable degree of certainty that the server was 'sabotaged' by anyone prior to the inspection and examination by Mr. Karchmer, without additional review."

Karchmer filed a lengthy reply declaration that refuted Massoud's "speculative scenarios." He noted that Massoud did not ask for a copy of the hard drive images and did not inspect the servers or any data himself. Karchmer stated "[i]t is not industry standard within the digital forensics community to simply review another expert's report and refute it based on only what is contained within a declaration, when the actual computer evidence was immediately available for inspection and analysis" Karchmer concluded that "[a]ny digital forensic examiner would come to the same conclusion I have if they simply examine either: [¶] A) the Info Tech email server as it existed during my inspection, and/or [¶] B) the hard drive images I made from all the hard drives in the Info Tech email server while Mr. Kim and counsel were present watching me do so."

B. The Trial Court's Ruling

The trial court tentatively granted terminating sanctions and later confirmed its ruling after hearing oral argument. The court found Karchmer's declaration to be credible because he physically investigated the servers and provided a detailed explanation for his findings. It found that Kim's declaration lacked credibility and had "no evidentiary value," stating that "Kim is not an IT expert and so his conclusions regarding any observations have no foundation. The Court agree[d] that the conclusions of paragraph 16 [of Kim's declaration regarding how Karchmer allegedly wiped the hard drive configuration] in particular lack[ed] foundation."

The court found that Massoud's declaration had limited evidentiary value. The court agreed with R Consulting's objections that Massoud conducted no independent examination of defendants' servers and relied almost exclusively on his two interviews with Kim. The court found Massoud's "declaration is replete with speculation and conjecture. He states possibilities and what 'could have happened.' Supporting Mr. Kim's 'possible scenarios' does not refute Mr. Karchmer. He nowhere refutes the persuasive conclusions of expert Karchmer."

The court found that Karchmer's reply declaration refuted Kim's claims that Karchmer was responsible for destroying the servers and "sufficiently demonstrate[d] that the configuration of the server . . . was inexplicable other than intentional shuffling. 'Hard drives have been removed and shuffled between computers.' " The court noted that although Kim claimed that US Colo had shut down the servers in July 2016 denying defendants access, Karchmer indicated that on June 24, 2016, an e-mail export occurred, and " '[s]ometime on or after July 14, 2016, hard drives from the email server and its attached storage array were rearranged arbitrarily—making data recovery (including recovery of email messages/attachments) impossible.' [Citation.] If shuffling occurred between July 14, 2016 and November 1, 2016, this would have been in contravention of this Court's orders regarding the servers."

The court concluded "that defendants have tampered with the servers such that useful data is no longer recoverable from the servers. The Court can make no other conclusion but this was willful and designed to avoid providing evidence in this action. This conduct is not only in violation of discovery obligations but contravenes this Court's orders since June,

2016. The Court thus GRANTS terminating sanctions against defendants. The Court does not see any less restrictive remedy given the nature and scope of the 'missing evidence' in this matter."

C. Analysis

Defendants assert that R Consulting's motion relied on "conclusions and assumptions" and that substantial evidence failed to support the trial court's order. Specifically, they claim that R Consulting failed to present any evidence establishing that they, or their agents, had physical access to the stored servers which was necessary to " 'physically remove[] the hard drives.' " Defendants state that they presented undisputed evidence that neither they nor their agents had physical access to the stored servers after April 2016.

"We review the trial court's order under the abuse of discretion standard and resolve all evidentiary conflicts most favorably to the trial court's ruling. We will reverse only if the trial court's order was arbitrary, capricious, or whimsical. It is appellant's burden to affirmatively demonstrate error and where the evidence is in conflict, we will affirm the trial court's findings. [Citation.] We presume the trial court's order was correct and indulge all presumptions and intendments in its favor on matters as to which it is silent." (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1224.) If the trial court makes factual determinations in ruling on a motion for discovery sanctions, the ruling is subject to the substantial evidence standard of review. (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 430.) Once the trial court has determined the facts, we review the trial court's ruling for abuse of discretion. (*Ibid.*)

"[A] trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence directly contradicting it, and this rule applies to an affidavit." (*Lohman v. Lohman* (1946) 29 Cal.2d 144, 149; *Tammen v. County of San Diego* (1967) 66 Cal.2d 468, 477.) "As an appellate court, we do not review the evidence for its 'believability,' [and] [q]uestions of credibility are for the trial court." (*Jones v. Adams Financial Services* (1999) 71 Cal.App.4th 831, 839 (*Jones*).) "When two or more inferences can reasonably be deduced from the facts, we do not substitute our deductions for those of the finder of fact. [Citation.] We must affirm if substantial evidence supports the trier of fact's determination, even if other substantial evidence would have supported a different result." (*Canister v. Emergency Ambulance Service, Inc.* (2008) 160 Cal.App.4th 388, 394.) This rule applies if the trial court makes a credibility determination based on declarations as well as oral testimony. (See *United Health Centers of San Joaquin Valley, Inc. v. Superior Court* (2014) 229 Cal.App.4th 63, 74; *Fininen v. Barlow* (2006) 142 Cal.App.4th 185, 189-190.)

" '[T]he weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion.' [Citation.] [I]ts value ' " 'rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion. . . .' " ' [Citation.] Such an opinion is no better than the reasons given for it [citation], and if it is 'not based upon facts otherwise proved, or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence.' " (*White v. State of California* (1971) 21 Cal.App.3d 738, 759, italics omitted.)

The threshold question before us is whether substantial evidence supported the trial court's finding that defendants had willfully tampered with their servers rendering it impossible to recover any useful data from them. Karchmer's declaration established that the e-mail server had an atypical hard drive configuration and was nonfunctional in its current state. Karchmer stated that the e-mail server did not work either because of how the hard drives had been configured, from the actual data content being changed on the hard drives, or from both of these changes. Karchmer determined that someone had physically moved hard drives from the e-mail server and plugged them into the storage array and that moving the hard drives made it impossible to recover any data. Karchmer found that one of the hard drives in the storage array came from the e-mail server. This hard drive revealed that someone had logged onto the e-mail server on June 24, 2016, and that data from 177 individual mailboxes had been exported during a six-hour period. He concluded that sometime on or after July 14, 2016, hard drives from the e-mail server and the storage array had been arbitrarily rearranged making data recovery impossible.

The declarations filed in opposition to the motion do not challenge Karchmer's pivotal conclusion that the hard drives had been shuffled between the e-mail server and storage array. Rather, Kim claimed that US Colo "block[ed]d physical access" to the servers in April 2016; thus, it was physically impossible for defendants to tamper with the servers. Defendants, however, produced no evidence from US Colo to support their claim that US Colo had blocked access to the servers in April 2016. The trial court found Kim's declaration to be incredible and without "evidentiary value." We cannot reassess witness credibility on appeal (*Jones, supra*, 71 Cal.App.4th at p. 839), and it was within the province

of the trial court to reject Kim's statement regarding defendants' access to the servers even in the absence of evidence contradicting it. (*Lohman v. Lohman, supra*, 29 Cal.2d at p. 149.)

Kim also concluded that "any failure of Mr. Karchmer to extract data from the server was due to Karchmer's own conduct in how he proceeded with the inspection and examination of the server at issue." Kim's declaration, however, is devoid of any facts showing he possesses an adequate foundation; i.e., expertise in computers or digital forensics, to support such for such conclusions. Moreover, Karchmer provided a detailed rebuttal to Kim's claim that Karchmer's own conduct wiped the hard drives.

Massoud claimed that physically moving hard drives from their original locations and putting them back in random positions was not the only explanation for why the e-mail data became irretrievable. He posited that the data could have been made irretrievable "due to a wide range of possible errors or occurrences" and it was possible that the "servers could have been operable in the configuration" that Karchmer described. Massoud, however, never examined the servers or the hard drive images. He relied exclusively on his interviews with Kim to provide speculative scenarios explaining why data on the hard drives became irretrievable. Karchmer stated in his reply declaration that, after examining the e-mail server and the hard drive images, any digital forensic examiner would reach the same conclusions he had made and that Massoud's failure to inspect the servers and the hard drive images, and his reliance on communications with Kim, were "not industry standard." Thus, the trial court properly concluded that Massoud's declaration had limited evidentiary value.

Based on the evidence presented, the trial court could properly conclude that defendants had willfully shuffled the hard drives to make data retrieval impossible.

Defendants do not challenge the trial court's conclusion that R Consulting was prejudiced by the loss of all the data on the servers. Thus, defendants impliedly recognized that this loss severely hampered R Consulting's ability to pursue its complaint and defend the cross-complaint. Accordingly, the trial court did not abuse its discretion by concluding that a lesser remedy would be insufficient to protect R Consulting's interests in the face of defendants' willful destruction of evidence.

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.